

AMENDED IN SENATE JULY 21, 2003
AMENDED IN SENATE JULY 15, 2003
AMENDED IN SENATE JULY 3, 2003
AMENDED IN SENATE JUNE 18, 2003
AMENDED IN ASSEMBLY APRIL 8, 2003
AMENDED IN ASSEMBLY MARCH 25, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL

No. 572

Introduced by Assembly Member Yee

February 18, 2003

An act to amend Sections 6310 and 6312 of, to add Sections 6312.2, 6312.3, and 6312.5 to, and to repeal and add Section 6311 of, the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 572, as amended, Yee. Employment.

Under existing law, it is unlawful to discriminate against an employee for filing a complaint as to an unlawful employment practice, and the Labor Commissioner is required to investigate complaints of unlawful employment practices.

This bill would provide standards ~~and establish time limits~~ for the Labor Commissioner's investigation and decision.

Under existing law, if an employer does not comply with an order of the Labor Commissioner, the Labor Commissioner is required to bring an action in court for relief.

This bill would further require the Labor Commissioner to petition the court for appropriate temporary relief unless good cause exists for not doing so.

Under existing law, if an employee is unlawfully required and refuses to perform unsafe work, the employee is entitled to reinstatement and reimbursement for lost wages.

This bill would also allow the employee to recover a penalty, as well as reasonable attorney's fees and costs.

Under existing law, an employer who refuses to comply with an order of the Labor Commissioner is guilty of a misdemeanor.

This bill would make it a misdemeanor to intentionally refuse to rehire, promote, or restore an employee determined to be eligible therefor, thereby imposing a state-mandated local program.

Under existing law, any employee who believes that he or she has been discharged or otherwise discriminated against may file a complaint with the Labor Commissioner.

The bill would set forth the procedures for the filing, investigating, and determining complaints of occupational safety and health discrimination and would require the Labor Commissioner to establish additional procedures for processing complaints and require the Division of Labor Standards Enforcement annually to file a report with the Legislature setting forth certain statistical information relating to employee safety and health and information concerning employee grievances.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. It is the intent of the Legislature that employees
- 2 in this state have effective and enforceable rights to secure safe and
- 3 healthful working conditions, and to this end, be protected against
- 4 reprisals for complaints about hazardous conditions and refusals



1 to work in hazardous conditions. The following enumeration of
2 rights and remedies shall be available and rigorously enforced.

3 SEC. 2. Section 6310 of the Labor Code is amended to read:

4 6310. (a) It is an unlawful employment practice for an
5 employer to subject an employee to an adverse employment action
6 because any of the following has occurred:

7 (1) The employee filed, caused to be filed, or made known his
8 or her intention to file, any oral or written complaint to the
9 division, other governmental agencies having statutory
10 responsibility for or assisting the division with reference to
11 employee safety or health, his or her employer or any agent of his
12 or her employer, or his or her representative. *The complaint shall*
13 *be in good faith about a working condition or practice that he or*
14 *she reasonably believes to be unsafe or dangerous, to create a real*
15 *and apparent hazard, or to be likely to cause death or serious*
16 *physical harm, whether or not there exists an occupational safety*
17 *and health standard or order that is being violated. The complaint*
18 *shall be with regard to one or more conditions or practices*
19 *affecting the employee, his or her fellow employees, or the*
20 *employees of another employer.*

21 (2) The employee instituted or caused to be instituted any
22 proceeding under or relating to his or her rights or has testified or
23 is about to testify in the proceeding or because of the exercise by
24 the employee on behalf of himself, herself, or others of any rights
25 afforded him or her pursuant to Division 5 (commencing with
26 Section 6300).

27 (3) The employee participated in an occupational health and
28 safety committee.

29 (4) The employee refused to perform unsafe work the
30 performance of which may violate any provision of this code,
31 including Section 6400, any occupational safety or health
32 standard, or any safety order of the Division of Labor Standards
33 Enforcement or the Occupational Safety and Health Standards
34 Board, as further defined in subdivision (d).

35 (b) An employer who violates subdivision (a) is liable for the
36 following:

37 (1) Twenty-five thousand dollars (\$25,000) or three times the
38 value of the employee's lost benefits and wages, whichever is
39 greater.

1 (2) Other pecuniary losses caused by the violation of
2 subdivision (a).

3 (3) Reinstatement.

4 (4) Reasonable attorney's fees and costs.

5 (c) For purposes of this section, "adverse employment action"
6 means a discharge, demotion, or suspension of an employee, or an
7 action that threatens to discharge or in any other manner
8 discriminates against an employee in a term or condition of
9 employment.

10 (d) For purposes of this section, "refused to perform unsafe
11 work" means a refusal to perform work under all of the following
12 conditions:

13 (1) The employee complained in good faith about *a working*
14 ~~conditions or practices~~ *condition or practice* which he or she
15 reasonably believed to be unsafe or dangerous, ~~created a real and~~
16 ~~apparent hazard, or was likely to cause death or serious physical~~
17 ~~harm to the employee, his~~ *to create a real and apparent hazard,*
18 *or to be likely to cause death or serious physical harm, whether or*
19 *not there existed an occupational safety and health standard or*
20 *order that was being violated. The complaint shall be with regard*
21 *to one or more conditions or practices affecting the employee, his*
22 *or her fellow employees, or the employees of another employer.*

23 (2) As soon as practicable, and immediately upon request, the
24 employee reported his or her refusal and reasons to his or her
25 immediate supervisor, foreperson, or any person in authority.

26 (3) The employee performed alternative work if requested by
27 the employer.

28 SEC. 3. Section 6311 of the Labor Code is repealed.

29 SEC. 4. Section 6311 is added to the Labor Code, to read:

30 6311. Any employer who willfully refuses to rehire, promote,
31 or otherwise restore an employee or former employee who had
32 been determined to be eligible for rehiring or promotion or
33 restoration by a grievance, procedure, arbitration, or hearing
34 authorized by law, is guilty of a misdemeanor.

35 SEC. 5. Section 6312 of the Labor Code is amended to read:

36 6312. Any employee who believes that he or she has been
37 subjected to an adverse employment action by any person in
38 violation of Section 6310 may file a complaint with the Labor
39 Commissioner pursuant to Section 6312.3.

40 SEC. 6. Section 6312.2 is added to the Labor Code, to read:

1 6312.2. Within ~~40~~ 20 days of receipt of a complaint of an
2 adverse employment action in violation of Section 6310, the Labor
3 Commissioner or his or her designee shall ~~preliminarily review it~~
4 *complete a preliminary review* to determine whether to proceed
5 with a full investigation. No later than June 30, 2004, and before
6 implementing this subdivision for preliminary review, the Labor
7 Commissioner shall develop evaluation criteria for the
8 preliminary review. The criteria, as well as data and explanatory
9 information regarding the matters to which these criteria are
10 applied, shall be included in the first annual report to the
11 Legislature pursuant to subdivision (b) of Section 6312.5. The data
12 and explanatory information and any changes to the criteria shall
13 also be included in subsequent annual reports to the Legislature
14 pursuant to subdivision (b) of Section 6312.5. The decision of the
15 Labor Commissioner whether or not to pursue a full investigation
16 shall be without prejudice to the right of a complainant to pursue
17 or obtain any other legal remedy he or she may have and is not
18 intended to, and does not affect existing rights or remedies
19 available to a complainant. This section shall remain in effect only
20 until January 1, 2006, and as of that date is repealed, unless a later
21 enacted statute enacted before January 1, 2006, deletes or extends
22 that date.

23 SEC. 7. Section 6312.3 is added to the Labor Code, to read:

24 6312.3. (a) Any person who believes that he or she has been
25 discharged or otherwise discriminated against in violation of
26 Section 6310 may file a complaint with the Labor Commissioner
27 within six months after the occurrence of the violation. The
28 six-month period may be extended by the Labor Commissioner for
29 good cause.

30 (b) The Labor Commissioner or his or her designee shall assign
31 the complaint to an occupational safety and health discrimination
32 complaint investigator who shall prepare and submit a report to the
33 Labor Commissioner based on an investigation of the complaint.
34 The Labor Commissioner may designate the chief deputy, an
35 assistant Labor Commissioner, or the chief counsel to receive and
36 review the reports.

37 (c) No later than June 30, 2004, the Labor Commissioner shall
38 establish procedures for the investigation of occupational safety
39 and health discrimination complaints.

(d) Upon receipt of a complaint, the Division of Labor Standards Enforcement shall provide to each complainant:

(1) A summary of the procedures for processing the complaint.

(2) Notice that the complainant may file a separate, concurrent complaint with the United States Department of Labor within 30 days after the occurrence of the violation.

(e) The procedures required in subdivision (c) shall, at a minimum, comply with the following:

(1) The Division of Labor Standards Enforcement shall provide the complainant and respondent written notice of whether or not it shall proceed with ~~a~~ *that* full investigation and shall commence a full investigation within 20 days of the date of receipt of the complaint.

(A) If the Division of Labor Standards Enforcement does not believe the complainant provided sufficient enough information to process the complaint, it shall so notify the complainant of that fact as soon as possible, ~~but not later than within 10 days of receipt of the complaint,~~ and shall instruct the complainant regarding what additional specific information is needed to process the complaint.

(B) Upon commencement of a full investigation, a written notice shall inform the complainant and respondent of the nature of the complaint, their respective rights and responsibilities, and of all procedures involved in resolving the complaint, as set forth in Section 98.

(2) The Division of Labor Standards Enforcement shall issue subpoenas, upon showing of good cause, for additional evidence in any form or to compel testimony from a witness.

(3) The investigation shall be conducted by an inspector, investigator, or attorney designated by the Division of Labor Standards Enforcement, who shall obtain and consider, at a minimum, the following information:

(A) Written statements and transcripts of oral statements submitted by the complainant in response to questioning by the division, which shall include all the elements of a prima facie case.

(B) Written statements submitted by the respondent.

(C) Written statements or transcripts of oral statements submitted by the complainant in response to questioning by the division, which shall include questioning the complainant regarding evidence that might tend to rebut statements offered by the respondent.

(D) Documents subpoenaed from the respondent or any other relevant source to support or rebut the evidence of the complainant or the respondent.

(E) Written statements or transcripts of oral statements given by witnesses who have information concerning the alleged violation. The identity of a witness shall remain confidential unless the identification of the witness becomes necessary to proceed with the investigation or to prosecute an action to enforce a determination.

(4) *At any time before the Labor Commissioner, or his or her designee, issues his or her report or decision, he or she may hold an investigative hearing if, in his or her opinion, a hearing is necessary. All formal declarations, documentary evidence, and any investigative reports that have previously been filed shall be made a part of the record. The complainant and the respondent shall have the opportunity to review the record. The complainant and the respondent shall have the right to be present, to present further evidence, and to present and cross-examine witnesses. The Division of Labor Standards Enforcement shall issue, serve, and enforce subpoenas on behalf of itself, the complainant, or the respondent to compel the attendance of witnesses or to produce evidence at the hearing.*

(5) The person conducting the investigation shall, ~~within 20 days of the date an investigation was commenced,~~ submit to the Labor Commissioner or his or her designee, a written investigation report summarizing the findings of the investigation and all the information obtained pursuant to ~~subparagraphs (1) to (3)~~ *paragraphs (1) to (4), inclusive.* The investigation report shall include recommended findings of fact and conclusions of law, and shall also include attachments of all statements and documents obtained in the investigation.

~~(5) The Labor Commissioner shall, within 40 days of the date an investigation was commenced, issue a decision including findings of fact and conclusions of law.~~

~~(6) At any time before the Labor Commissioner or his or her designee issues his or her decision, he or she may hold an investigative hearing if, in his or her opinion, a hearing is necessary. All formal declarations, documentary evidence, and any investigation reports that may have been previously filed shall be made a part of the record. The complainant and respondent shall~~

1 have the opportunity to review the record. The complainant and
2 the respondent shall have the right to be present, to present further
3 evidence, and to present and cross-examine any and all witnesses.
4 The Division of Labor Standards Enforcement may issue, serve,
5 and enforce subpoenas on behalf of itself, the complainant, or the
6 respondent to compel the attendance of witnesses or to produce
7 evidence at the hearing.

8 ~~(f) The Labor Commissioner shall, within 50 days of the date~~
9 ~~an investigation was commenced, if a violation has occurred,~~

10 (6) *The Labor Commissioner shall notify the complainant and*
11 *respondent of his or her determination not later than 60 days after*
12 *the filing of the complaint. The notice shall inform the parties of*
13 *their right to request a copy of all reports, attachments, statements,*
14 *documents, and hearing transcripts.*

15 (f) *If the Labor Commissioner determines a violation has*
16 *occurred, he or she shall promptly notify the complainant and*
17 *respondent and direct the respondent to cease and desist from the*
18 *violation and take any action deemed necessary to remedy the*
19 *violation, including, but not limited to, where appropriate,*
20 *rehiring or reinstatement, reimbursement of lost wages and*
21 *benefits and interest thereon, payment of reasonable attorney's*
22 *fees associated with any hearing held by the Labor Commissioner*
23 *in investigating the complaint, the posting of notices to employees,*
24 *and specific penalties set forth in subdivision (b) of Section 6310*
25 *for matters charging a violation of Section 6310.*

26 (1) *If the respondent does not comply with the order within 10*
27 *days following notification of the Labor Commissioner's*
28 *determination, the Labor Commissioner shall, within 60 days of*
29 ~~*the date an investigation was commenced,*~~ *bring an action court*
30 *promptly against the respondent in a court of competent*
31 *jurisdiction. The Labor Commissioner shall petition the court for*
32 *appropriate temporary relief or restraining order unless he or she*
33 *determines good cause exists for not doing so. If the Labor*
34 *Commissioner prevails in this action, the court shall award*
35 *reasonable attorney's fees, court costs, and investigative costs to*
36 *the Labor Commissioner. Fees and costs that are awarded to the*
37 *Labor Commissioner shall be retained by the Labor Commissioner*
38 *and used to fund investigations of complaints filed pursuant to*
39 *Section 6310.*

(2) If the Labor Commissioner fails to bring an action in court ~~within 60 days~~ *promptly*, the complainant may bring an action against the Labor Commissioner in any appropriate court for a writ of mandate to compel the Labor Commissioner to bring an action in court against the respondent. If the complainant prevails in his or her action for a writ, the court shall award the complainant court costs and reasonable attorney's fees, notwithstanding any other law.

(3) Regardless of any delay in bringing an action in court, the Labor Commissioner shall not be divested of jurisdiction.

(4) In any action, the court may permit the claimant to intervene as a party plaintiff to the action and shall have jurisdiction, for cause shown, to restrain the violation and to order all appropriate relief. Appropriate relief includes, but is not limited to, rehiring or reinstatement of the complainant, reimbursement of lost wages and benefits and interest thereon, specific penalties set forth in subdivision (b) of Section 6310 for matters charging a violation of Section 6310, and any other compensation or equitable relief as is appropriate under the circumstances of the case.

(g) (1) The Labor Commissioner shall, within 50 days of the date an investigation was commenced, and if no violation has occurred, dismiss the complaint.

(2) The Labor Commissioner may direct the complainant to pay reasonable attorney's fees associated with any hearing held by the Labor Commissioner if the Labor Commissioner finds the complaint was frivolous, unreasonable, groundless, and was brought in bad faith.

(3) The complainant may, after notification of the Labor Commissioner's determination to dismiss a complaint, bring an action in an appropriate court, which shall have jurisdiction to determine whether a violation occurred, and if so, to restrain the violation and order all appropriate relief to remedy the violation. Appropriate relief includes, but is not limited to, rehiring or reinstatement of the complainant, reimbursement of lost wages and benefits and interest thereon, specific penalties set forth in subdivision (b) of Section 6310 for matters charging a violation of Section 6310, and other compensation or equitable relief as is appropriate under the circumstances of the case.

(4) When dismissing a complaint, the Labor Commissioner shall advise the complainant of his or her right to bring an action

1 in an appropriate court if he or she disagrees with the
2 determination of the Labor Commissioner, and in the case of an
3 alleged violation of Section 6310, to file a complaint against the
4 state program with the United States Department of Labor.

5 (5) The filing of a timely complaint against the state program
6 with the United States Department of Labor shall stay the Labor
7 Commissioner's dismissal of the division complaint until the
8 United States Secretary of Labor makes a determination regarding
9 the alleged violation. Within 15 days of receipt of that
10 determination, the Labor Commissioner shall notify the parties
11 whether he or she will reopen the complaint filed with the division
12 or whether he or she will reaffirm the dismissal.

13 ~~(i)~~

14 (h) The Labor Commissioner shall notify the complainant and
15 respondent of his or her determination under subdivision (f) or
16 paragraph (1) of subdivision (g), not later than 60 days after the
17 filing of the complaint. Determinations by the Labor
18 Commissioner under subdivision (f) or (g) may be appealed by the
19 complainant or respondent to the Director of Industrial Relations
20 within 10 days following notification of the Labor
21 Commissioner's determination. The appeal shall set forth
22 specifically and in full detail the grounds upon which the appealing
23 party considers the Labor Commissioner's determination to be
24 unjust or unlawful, and every issue to be considered by the
25 director. The director may consider any issue relating to the initial
26 determination and may modify, affirm, or reverse the Labor
27 Commissioner's determination. The director's determination shall
28 be the determination of the Labor Commissioner. The director
29 shall notify the complainant and respondent of his or her
30 determination within 10 days of receipt of the appeal.

31 (i) The rights and remedies provided by this section do not
32 preclude an employee from pursuing any other rights and remedies
33 under any other law. Nothing in this section is intended to, nor does
34 it affect existing rights or remedies available to a complainant.

35 SEC. 7. Section 6312.5 is added to the Labor Code, to read:

36 6312.5. (a) In order to more effectively protect employees'
37 rights to secure, safe, and healthful working conditions, and to
38 assure effective and enforceable rights in the event of reprisal for
39 involvement with occupational health and safety issues, there shall
40 be designated within the Division of Labor Standards

1 Enforcement a unit or personnel designated solely to handle
2 matters pursuant to Sections 6310 to 6312, inclusive.

3 (b) The Division of Labor Standards Enforcement shall file an
4 annual report with the Legislature by December 1 of each year.
5 This report shall provide an accounting of all matters involving
6 Sections 6310 to 6312, inclusive, and shall report statistics so as
7 to coincide with the Federal Occupational Safety and Health
8 Administration fiscal year. The report shall include, but is not
9 limited to, information regarding cases filed, investigated,
10 dismissed, settled, heard, or appealed, the caseload of the Division
11 of Labor Standards Enforcement, the timeliness of dispositions,
12 and other information the Legislature may request in advance of
13 the report. The Legislature shall direct the division as to any
14 additional items to include in the report by October 1 of the year
15 the report is due. The Legislature may hold a hearing on the report
16 and obtain additional information after the report is submitted.

17 SEC. 8. It is the intent of the Legislature that any costs to the
18 Division of Labor Standards Enforcement that may result from
19 additional caseloads due to the enactment of this statute shall be
20 paid from grants available under subdivision (g) of Section 672 of
21 Title 29 of the United States Code.

22 SEC. 9. No reimbursement is required by this act pursuant to
23 Section 6 of Article XIII B of the California Constitution because
24 the only costs that may be incurred by a local agency or school
25 district will be incurred because this act creates a new crime or
26 infraction, eliminates a crime or infraction, or changes the penalty
27 for a crime or infraction, within the meaning of Section 17556 of
28 the Government Code, or changes the definition of a crime within
29 the meaning of Section 6 of Article XIII B of the California
30 Constitution.

